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Supreme Court of the United States

OCTOBER TERM, 1931.

No. .....

BALTIMORE AND PHILADELPHIA STEAMBOAT COMPANY and MARYLAND CASUALTY COMPANY,

Petitioners,

vs.

AUGUSTUS P. NORTON, Deputy Commisssioner for Third Compensation District of United States,

and

EMIL BRUNO GUBE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioners, Baltimore & Philadelphia Steamboat Co. and Maryland Casualty Co. pray that a writ of certiorari issue to review the final decree of the United States Circuit Court of Appeals for the Third Circuit, *R. 44*, entered March 25, 1931, which affirmed a decree of the United States District Court for the Eastern District of Pennsylvania. *R. 19 and 20.*

Jurisdiction.

The judgment below was entered March 25, 1931. Jurisdiction of this court is provided by 28 U. S. C., Sec. 347(a).

Opinions Below.

The District Court opinion is reported in 40 Fed. (2d) 530. The opinion of the United States Circuit Court of Appeals is reported in 48 Fed. (2d) 57.

Question Presented.

The question presented is the construction of a federal statute, to wit: Sec. 8 of the "Longshoremen's and Harbor Workers' Compensation Act". 33 U. S. C. §908.

That section deals with the computation of the amount of compensation to be awarded to an injured employee. By the method of computation used by the court below, the employee received compensation for 146 weeks. By the method of computation urged by this petitioner, the employee would have received compensation for only 125.6 weeks. By the method of computation used by other Federal Courts, he would have received 126.8 weeks.

Whether the court below is correct, or whether the petitioner is correct, depends upon the interpretation and construction of Section 8 of the Act.

Although the difference between the two methods of computation when measured in dollars in this particular case is small, the principle involved is of vital concern, both to employees and employers and their insurance carriers throughout the United States.

Ever since the passage of the Act, the question here presented has been in controversy. There have been conflicting decisions on the question by widely scattered Fed-

eral Courts, which have resulted in varying interpretations by the United States Employees' Compensation Commission.

THE FACTS.

Emil Bruno Gube, on February 17, 1928, while in the employ of the petitioner, Baltimore & Philadelphia Steamboat Co., sustained an injury to his left arm while he was working as a longshoreman on a vessel lying in navigable waters of the United States. *R. 4, 8.* Gube filed a claim for compensation under the Act* against his employer and the petitioner, Maryland Casualty Co., which was the insurance carrier for the employer. *R. 4, 9.*

After a hearing the Deputy Commissioner, Augustus P. Norton, respondent herein, made findings of fact and granted an award of compensation for 146 weeks at a certain rate. *R. 7, 8, 9.*

This award was made against the petitioner, Baltimore & Philadelphia Steamship Co., as the employer and against the petitioner, Maryland Casualty Co., as the insurance carrier. *R. 9.*

Thereupon and in conformity with the method provided by Sec. 21 of the Act,† both petitioners filed a bill of com-

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* Longshoremen's & Harbor Workers' Act, 33 U. S. C. § 908.

† Sec. 21 (33 U. S. C. § 921) reads as follows:

"Sec. 21. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this chapter, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in

plaint in the United States District Court for the Eastern District of Pennsylvania, seeking,—

(a) To set aside the Deputy Commissioner's finding that the average weekly wage was $36.06, and to set aside his award based thereon of $24.04 per week; and

(b) To set aside the order for compensation for 146 weeks and to substitute therefor an order for compensation for only 125.6 weeks.

To this bill of complaint an answer was made by the respondent Gube, only. The Commissioner, Norton, against

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which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceedings unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

(c) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the Supreme Court of the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918."

whom the proceeding was also brought, did not file any answer. *R. 5 and 21.*

The matter came on for hearing before Honorable O. B. Dickinson, District Judge, who filed an opinion sustaining the award of the Deputy Commissioner. A decree was entered dismissing the bill. *Opinion, R. 9,* reported at 40 Fed. (2d) 530, *Opinion on Reargument, R. 16, Decree, R. 19.*

Thereafter petitioners appealed to the United States Circuit Court of Appeals for the Third Circuit, which affirmed the decree of the District Court. Its opinion is reported in 48 Fed. (2d) 57. *R. 35 to 43.*

The petitioners do not here seek to review the decision of the court below upon the rate of compensation. The sole question which the petitioners ask to have reviewed is that dealing with the number of weeks for which compensation should run.

The full text of the pertinent parts of Sec. 8 is as follows:

"Sec. 8. Compensation for disability shall be paid to the employee as follows:

. . . . . .

"(b) Temporary total disability: In case of disability total in character but temporary in quality 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

"(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, and shall be paid to the employee, as follows:

"(1) Arm lost, three hundred and twelve weeks' compensation.

. . . . . .

"(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

"(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

"(22) In case of temporary total disability and permanent partial disability, both resulting from the same injury, if the temporary total disability continues for a longer period than the number of weeks set forth in the following schedule, the period of temporary total disability in excess of such number of weeks shall be added to the compensation period provided in subdivision (c) of this section: Arm, thirty-two weeks; leg, forty weeks; hand, thirty-two weeks; foot, thirty-two weeks; eye, twenty weeks; thumb, twenty-four weeks; first finger, eighteen weeks; great toe, twelve weeks; second finger, twelve weeks; third finger, eight weeks; fourth finger, eight weeks; toe other than great toe, eight weeks.

"In any case resulting in loss or partial loss of use of arm, leg, hand, foot, eye, thumb, finger, or toe, where the temporary total disability does not extend beyond the periods above mentioned for such injury, compensation shall be limited to the schedule contained in subdivision (c)."

It will be seen that when a man is totally disabled for a temporary period he receives compensation as long as he is so disabled. Subsection (b). However, when he is partially disabled, but permanently so, he receives compensation according to a fixed schedule. Subsection (c). Thus the complete loss of an arm results in the payment of 312 weeks compensation and a partial loss or loss of use of an injured member results in a proportionately smaller number of weeks.

In case the permanent partial disability is combined with a temporary total disability, then the injured man receives the compensation provided as per schedule but the schedule is increased by adding to it the number of weeks by which the period of total disability exceeds a certain stated period called the healing period. Subsection (c), paragraph (22). If on the other hand the period of temporary total disability does not exceed the fixed healing period stated in paragraph 22 nothing is added at all.

The Deputy Commissioner found that Gube was totally disabled for 34 weeks and that he suffered a permanent partial disability, amounting to 40% of the use of his arm. *R. 8, 9.* These findings are not disputed.

There is only a question of law involved. It is how many weeks compensation Gube should be allowed for such injuries.

The court below allowed Gube 146 weeks. The petitioners contend that he should have been allowed only 125.6 weeks.

The court below calculated its 146 weeks as follows:

Allowance by Section 8 (b) and c-22 for temporary total disability		34 weeks
Allowance by Section 8 (c) (1) for loss of arm	312 weeks	
Add excess of healing period allowed by Section 8 (c) (22)	2 "	
Total compensation time	314 "	
Less temporary total disability period	34 weeks	

Permanent partial disability period	280 weeks	
40% of 280 weeks as per section 8 (c) (19) for proportionate loss of use of arm		112 weeks
Total		146 weeks

The petitioners calculated their 125.6 weeks as follows:

Schedule compensation time, Section 8 (c) 1	312 weeks	
Excess allowed by Section 8 (c) (22)	2 "	
40% of total	314 "	125.6 weeks

The reasons given by the Court for its computation were as follows:

Congress intended that a man suffering both types of disability should always be paid for both types of disability. It was said that it was the intent of Congress to allow full compensation for total disability during "the continuance thereof"; and in addition thereto to provide compensation for permanent partial disability according to the schedules.

In following this thought the court first allowed Gube 34 weeks for total disability under subsection (b). It then proceeded to estimate his compensation for permanent partial disability under the schedule in subsection (c). In doing so, it added two weeks to the schedule award of 312 weeks, because the total disability period was two weeks in excess of the healing period of 32 weeks. Subsection (c), paragraph (22). The total compensation time was, therefore, 314 weeks. Since, of this total compensation time Gube had already been awarded 34 weeks for total disabil-

ity, it was considered unjust that the employer should be required to pay for those 34 weeks again, and therefore the 34 weeks were deducted from the schedule loss, of 314 weeks, leaving as a balance, which was described as the permanent partial disability period (schedule loss), 280 weeks. Since Gube was only partially disabled to the extent of 40% he was allowed an award of 40% of the 280 weeks. This amounted to 112 weeks. The court then added the 34 weeks of total disability and reached the result of 146 weeks.

It was pointed out to the court that the last sentence in paragraph 22 of subsection (c) was important in that it indicated that Congress had a contrary intent to that found by the court. The subsection reads as follows:

"In any case resulting in loss or partial loss of use of arm . . . where the temporary total disability does not extend beyond the periods above mentioned (32 weeks) for such injury, compensation shall be limited to the schedule contained in subdivision (c)."

The court, however, refused to consider that sentence because the facts of the present case did not bring it within it. The court, however, did not give full force and effect to that sentence in searching for the intent of Congress.

The importance of the sentence becomes apparent by comparing the number of weeks which Gube would have received under it had it been applicable with those which he received under the court's opinion. If Gube had been totally disabled for only 32 weeks, instead of 34 weeks, Gube by the very words of the discarded sentence would have been entitled to 40% of 312 weeks, namely: 124.8 weeks. Nevertheless, the court said that because he was disabled two weeks more he should receive 21.2 weeks more compensation.

It is contended by the petitioners that Congress never intended any such absurd result and it is absolutely essential in finding the intention of Congress to consider the last sentence of paragraph 22 of subsection (c).

The petitioners arrive at their figure of 125.6 weeks for the following reasons:

Subsection (b) applies solely to a person having that type of disability and no other, viz.: temporary total disability.

Subsection (c) applies to persons having that type of disability, viz.: permanent partial disability, and also to persons having that type of disability combined with temporary total disability.

In short, Congress has specifically provided in subsection (c) for the combination of temporary total disability and permanent partial disability, such as Gube had. Congress having made this provision, subsection 8 (b) is totally irrelevant here.

Therefore, since Gube had both types of disability, he came within the express provisions of subsection (c), paragraph 22, and was entitled to have his schedule loss increased by two weeks, making a total of 314 weeks, and to receive 40% of that total, namely: 125.6 weeks.

The petitioners' contention is reenforced by a consideration of the last sentence of paragraph 22, subsection (c), where the clear intent of Congress to limit compensation to the schedule loss in subsection (c) is apparent in cases where both types of disability exist.

By the express terms of that sentence, if Gube had been totally disabled only 32 weeks he would have been entitled solely to 124.8 weeks' compensation. The mere fact that he was disabled two weeks longer, viz., 34 weeks, should

not increase his compensation by 21.2 weeks, as the court found. The petitioners' computation would increase it from 124.8 weeks to 125.6 weeks.

If the petitioners are wrong in their contention, the utmost that the compensation should be increased is two full weeks, to 126.8 weeks, which was the method adopted by the District Courts of the Southern District of Texas and the Western District of Washington. *Texas Employers' Insurance Assn.* v. *Sheppeard,* 32 F. (2d) 300; *Grays Harbor Stevedore Co.* v. *Marshall,* 36 F. (2d) 814.

Reasons for Granting the Petition.

1. There are two District Court decisions contrary to the decision here sought to be reviewed. They are *Texas Employers' Insurance Assn.* v. *Sheppeard,* 32 F. (2d) 300, D. C., S. D. of Texas; *Grays Harbor Stevedore Co.* v. *Marshall,* 36 F. (2d) 814, D. C. W. D. Wash.

The result of these two decisions is that in Texas and Washington the amount of compensation awarded is different from that awarded in the states embraced by the Third Circuit, although the Act itself is national in character and intended to have uniform operation throughout the United States.

2. Cases are arising almost daily before the various Deputy Commissioners, in which this question must be decided. In those districts where the Gube case is followed the employer and insurance carrier are compelled to pay increased amounts which in the aggregate will become oppressive.

3. There are other methods of computation besides those mentioned in this case. *Texas Employers' Ins. Assn.* v. *Sheppeard, supra,* and *Grays Harbor Stevedore Co.* v.

Marshall, supra. Those decisions gave the employees decidedly less than the Circuit Court of Appeals in the Gube case, but gave them a little more than the petitioner is here contending for.

The United States Employees' Compensation Commission, 2nd Compensation District, located in New York, has further refined the decision in the case at bar, by apportioning the healing period (subsection (c), paragraph (22)) in accordance with the percentage of loss of use. Subsection (c), paragraph (19). This has resulted in almost every instance in a protracted healing period which has increased the awards. No warrant for this is apparent anywhere in the act.

All of these divergent interpretations may be settled by a decision by this court on the point involved in the present case.

June 24, 1931.

Respectfully submitted,

BALTIMORE & PHILADELPHIA STEAMBOAT CO.,
MARYLAND CASUALTY CO.,

By

IRA A. CAMPBELL,
CLETUS KEATING,
VERNON S. JONES,
RAYMOND PARMER,
Of Counsel.

I hereby certify that I have examined the foregoing petition; that in my opinion it is well founded and entitled to the favorable consideration of the court; and that it is not filed for the purpose of delay.

VERNON S. JONES.

BRIEF IN SUPPORT OF PETITION.

The jurisdictional facts, proceedings, and opinions below are stated in the petition.

POINT I.

THE ACT DOES NOT PROVIDE FOR DOUBLE COMPENSATION.

The court below has said that the act shows an intent of Congress to give an employee two types of compensation, one for temporary total disability and the other for permanent partial disability. Inasmuch as the two types of compensation are described in separate paragraphs it would follow from this premise that Gube, for example, should have received 34 full weeks for his temporary total disability and 40% of 314 weeks for his permanent partial disability or a total of 159.6 weeks. This, it is admitted, would compensate Gube twice for the period of 34 weeks. In order to avoid such double compensation to which it should have been driven by its premise, the court arbitrarily said that it would not give Gube the full compensation for his permanent partial disability. In other words it deducted from 314 weeks, which the statute [subsection (c)] expressly allowed him, the 34 weeks for which he was being paid temporary total disability [subsection (b)]. Instead, therefore, of giving him 40% of 314 weeks it gave him 40% of 280 weeks. The court said:

> "As we read the statute we see in it the plain intent of the Congress to provide compensation for five situations, four occurring with single disabilities as in (a), (b), (c) and (d), and the fifth, (C-22), where temporary total disability and permanent par-

> tial disability occur jointly when both result from the same injury. Following that intent, it is clear that, two kinds of disabilities having been suffered, the compensation applicable to each should be paid so long as, within the statute's limitations, disabilities of these two characters continue respectively; and it is equally clear that as the statute distinguishes between the character of the disabilities and the time of their duration, the compensation should conform to each respectively; and that where, as in temporary total disability, the statute provides no deduction or apportionment, none should be made, and in the other (Permanent partial disability) where it provides an apportionment, one should be made yet only for the period of weeks to which compensation for disability of that 'character' relates."

The significant part of the above quotation are the last four lines, viz.:

> "where it provides an apportionment, one should be made yet only for the period of weeks to which compensation for disability of that 'character' relates."

This is nothing less than a statutory interpolation. There is nowhere in the Act any indication that the compensation for permanent partial disability shall be diminished from the periods set forth in the schedules. The act (Par. 22) provides only for increasing the schedules. Notwithstanding this the court has arbitrarily reduced the schedule compensation from 314 weeks to 280 weeks.

As pointed out above, this was done in order to avoid paying to Gube double compensation for the period during which he was totally disabled; that is, once under subsection (b) and again under subsection (c).

If, as the court maintained, Congress intended that Gube should have the two types of compensation, then he should have received double compensation. The fact that the court avoided this result indicates both that it was not Congress's intention to provide for double compensation nor to give the two types of compensation in the one case.

If it was not the Congressional intent to give an injured employee double compensation (and no one suggests that that was the Congressional intent), then it follows that Congress did not intend to give an injured employee two types of compensation for the same injury. To give the two types of compensation for the same injury logically demands the payment of double compensation, unless the anomalous result reached by the court below is substituted for the plain words of the statute.

The only method by which the words of the statute may be fully respected is on the assumption that Congress intended that an injured man should receive one type of compensation and one only. This is the contention of the petitioner.

In Gube's case the facts found by the commissioner show that he had a combined temporary total disability and a permanent partial disability. To his case only one provision of the statute is applicable, and that is subsection (c), paragraph (22). Under this provision Gube would receive a percentage of his schedule loss plus the excess healing period. This is just what Congress said he should receive.

That this is the true Congressional intent is revealed by comparing with Gube's case the results in cases where the disability is greater and cases where the disability is less than Gube had. For instance, if Gube had lost his en-

tire arm he would have had a permanent partial disability. The sole award to him would have been the full schedule loss of 312 weeks provided by subsection (c), subdivision (1), viz: 312 weeks' compensation. To this would have been added the two weeks by which his total disability exceeded the statutory healing period of 32 weeks. Paragraph 22. It has never been suggested by anyone that any more than this amount should be given to a man who has completely lost his arm. Indeed the Compensation Commission itself in its opinion on this section of the act has stated that that is just what such a man would receive. Opinion #34 of United States Employees' Compensation Commission January 3, 1929 reported in 1929, American Maritime Cases, p. 100. This amounts to an admission that only one type of disability is compensable even though both types are present.

As a further example there should also be considered the case of a man who has less temporary total disability than Gube. Assuming that Gube had been totally disabled only 32 weeks instead of 34 weeks, there can be no possible dispute that he would not be entitled to anything but 40% of 312 weeks under subsection (c). To give him a further award under subsection (b) for a total disability would be flying in the face of that part of paragraph (22) which reads as follows:

> "In any case resulting in loss or partial loss of use of arm, leg, hand, foot, eye, thumb, finger, or toe, where the temporary total disability does not extend beyond the periods above mentioned for such injury, compensation shall be limited to the schedule contained in subdivision (c)."

It was this sentence which the court below disregarded.

These two examples show that Congress had a consistent plan throughout. One section and one section only would have been applied to Gube if his permanent partial disability had been greater or his temporary total disability had been less, and the rule would have operated to give him a greater amount of compensation or a lesser amount of compensation depending upon the particular facts. There is no reason why the same section should not apply to the actual injury which Gube had. An intent that the statute be consistently applied is to be presumed.

In *Texas Employers Ins. Assn.* v. *Sheppeard,* 32 F. (2d) 300, D. C. S. D. Texas, the court set aside the order of the commissioner, which was based upon a computation by the same method as adopted by the court in the instant case. The court said, page 301:

> "That plaintiff is right, and that the method pursued by the commissioner was wholly arbitrary, and not only not supported by, but in the face of, the controlling section of the law, I think entirely plain."

The Compensation Act of the State of New York reads literally the same as the Federal Act here under consideration. The New York Act was passed in 1924, and the Federal Act was passed in 1927. It is fair to assume that the latter was copied from the former.

The New York Act has not been interpreted as the court below has interpreted the Federal Act. On the contrary, awards under similar sections of the New York Act have been computed in precisely the manner adopted by the courts in the cases of *Texas Employers Ins. Assn.* v. *Sheppeard, supra,* and *Grays Harbor Stevedore Co.* v. *Marshall,* 36 F. (2d) 814.

The following is a quotation from the New York State Department of Labor, Special Bulletin No. 161, issued in August, 1929, p. 103. This is the official publication of the Industrial Board, which is authorized to administer the New York Act:

> "In applying Subdivision 4-a of Sec. 15, the New York Department of Labor makes no distinction between total loss and partial loss. If an employee has lost 25 per cent of his hand, instead of the entire hand, the Department adds to the 61 weeks representing the 25 per cent the number of weeks of temporary total disability in excess of 32 weeks; that is, if the temporary total disability lasts 45 weeks, the employee will receive 61 weeks plus 13 weeks, a total of 74 weeks. By contrast, in applying the identical provisions of the Federal Longshoremen's and Harbor Workers' Compensation Act, the United States Employees' Compensation Commission (Opinion No. 34, January 3, 1929) does make a distinction between total loss and partial loss. In the above instance of loss of 25 per cent of the hand and 45 weeks temporary total disability, it subtracts the 45 weeks from 244 weeks, the schedule allowance for the entire hand, adds the 13 weeks excess and divides by 4, giving 53 weeks. To this it adds the 45 weeks, making a total compensation of 98 weeks as compared with the total of 74 awarded in New York."

The same method of computation as was used by the Districts Courts of the Southern District of Texas and the Western District of Washington was not disturbed by the court in New York in the case of *Eppenstein* v. *Adams & Co.*, 224 A. D. 332, affd. 250 N. Y. 562.

It is respectfully submitted that the intent of Congress has been disregarded in the decision below.

Respectfully submitted,

IRA A. CAMPBELL,
CLETUS KEATING,
VERNON S. JONES,
RAYMOND PARMEE,
Counsel for Petitioners.